SUPREME COURT, U. S.
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No. 374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SAMUEL WRIEOLE,
Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Criminal Action.
On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Sat below:
McLaughlin, Hastie and Freedman, Circuit Judges.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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OCTOBER TERM, 1966

No.

SAMUEL WRIEOLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Samuel Wrieole, your Petitioner, prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above-entitled cause on June 16, 1967.

Opinions Below

The opinion of the Honorable Gerald McLaughlin, Circuit Judge, United States Court of Appeals for the Third Circuit, has not been reported. It is set forth at p. 1a of the Appendix hereto.

The opinion of the Honorable Arthur Lane, J.D.C., on the issue of search and seizue is set forth at R31a, 8-34a, 40.*

* The letter "R" refers to the record of this matter set forth in the Appendix to defendant's brief in the U.S. Court of Appeals for the Third Circuit.

Jurisdiction

1. The judgment of the United States Court of Appeals for the Third Circuit was entered on June 16, 1967, and is final by its terms.

2. (a) The issue of the constitutionality of the Federal gambling tax statutes was raised at the trial level by motion to dismiss the Information (R35a) and in defendant's brief in the United States Court of Appeals for the Third Circuit (DB32*).

(b) The search and seizure issue was raised at the trial level by a motion to suppress evidence (R5a) and in defendant's brief in the United States Court of Appeals for the Third Circuit (DB16-26).

3. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Do not the Federal gambling tax statutes here involved violate the Petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this Court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 15 L. Ed. 2d 165, 86 S. Ct. 194 (1965), overrule *United States* v. *Kahriger,* 345 U.S. 22, 97 L. Ed. 754, 73 S. Ct. 778 (1953) and *Lewis* v. *United States,* 348 U.S. 419, 99 L. Ed. 475, 75 S. Ct. 415 (1955)?

2. Did the Government introduce sufficient evidence upon which the jury could rationally find beyond a reasonable doubt that the defendant was a principal in a gambling operation and should not this Court review the sufficiency of the evidence to more definitely clarify the burden of the Government under the gambling tax statutes?

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* The letters "DB" refer to defendant's brief in the United States Court of Appeals for the Third Circuit.

3. Was not the search of the defendant and seizure of evidence from him unreasonable and should not this Court channel the development of the law of search incident to arrest in New Jersey within the framework of the fundamental criteria laid down by the Fourth Amendment and opinions of this Court?

Statutory Provisions Involved

1. 26 U.S.C., Section 4401. (12a)
2. 26 U.S.C., Section 4411. (12a)
3. 26 U.S.C., Section 4412. (13a)
4. 26 U.S.C., Section 7203. (13a)
5. 26 U.S.C., Section 7262. (14a)

Constitutional Provisions Involved

1. The Fourth Amendment to the Constitution of the United States (15a)

2. The Fifth Amendment to the Constitution of the United States (15a)

3. The Tenth Amendment to the Constitution of the United States (15a)

4. The Fourteenth Amendment to the Constitution of the United States (15a)

Statement of the Case

This is a criminal action in which defendant was convicted of willful failure to pay the special occupational tax imposed by 26 U.S.C. 4411 and of willful failure to supply the registration information required by 26 U.S.C. 4412. The trial herein was held before the Honorable Arthur S. Lane, Judge, United States District Court, and a jury on May 17, 19, and 20, 1966 in the United States District Court, District of New Jersey, Trenton vicinage.

The Government proceeded herein by way of a three-count information (R3a-R4a) charging the above-described violations contrary to the provisions of 26 U.S.C. 7203 (R3a, 24-R4a, 21) and the lesser included offense of simple failure to pay the occupational tax in violation of 26 U.S.C. 7262 (R3a, 6-21). A verdict of not guilty was returned on the last mentioned charge (R2a, 22).

Defendant was taken into custody on December 16, 1964. At that time, Special Agents Michael Duffy and Irving Dubow were executing a warrant for the arrest of one Michael Delloiacono (R14a, 34-41) and a search warrant for premises owned by him and known as Mike's Sugar Bowl (R15a, 3-6; R20a, 36-41). They, and other law enforcement officials (R12a, 6-14), were assisted in that endeavor by Detective John Mazekian of the New Jersey State Police (R7a, 4-21). They found some five to eight individuals on the premises, the defendant among them (R10a, 39-41; 7a, 33-34; 18a, 26-32; 19a, 5-8; 21a, 24-25; 26a, 30-31). He was directed by Mazekian to empty his pockets (R12a, 3-8) and placed the contents thereof on a counter in the store (R12a, 29-30; R17a, 2-5). The agents allegedly seized a "rundown sheet" and currency in excess of seven hundred dollars (R17a, 5-7; 71a, 25-29). They also searched the defendant's car (R27a, 27-28), the person of one Russell Miraglia (R12a, 29-30), Miraglia's car (R27a, 19-20), the car of one of the other men found on the premises (R27a, 4-11), and the persons of the men in the store at the time of the raid (R71a, 5-10). These actions were all taken without benefit of a search warrant (R6a, 28-30; R27a, 25-26; R27a, 29-30). Only Delloiacono, the defendant, and Miraglia were arrested (R26a, 31-32). The agents found approximately $1,400 and a schedule of basketball games on the person of Miraglia (R12a, 22-25).

The defendant moved to suppress the evidence so seized (R5a). The above facts were established at a hearing on the motion held on February 15, 1965 (R6a-R34a). At that hearing, the following testimony was also adduced.

Trooper Mazekian testified that he entered Mike's Sugar Bowl at 11:00 A.M., made a brief search, advised the occupants of his purpose, and directed the defendant, among others, to empty his pockets (R7a, 24-31; R8a, 2-5; R12a, 2-7). Prior to the raid, he had been told by federal agents that a gambling operation was being conducted at Mike's Sugar Bowl and that bets had been made there (R8a, 24-31; 12a, 40-13a, 5). He did not know the name of the person who had given him that information (R13a, 4-5). His "purpose there was to effect any State arrest as the situation may warrant after the raid was in progress." (R8a, 37-39).

There was no testimony by Mazekian that he had expected to find the defendant on the premises. He ascertained the defendant's identity during the raid (R8a, 4-5; 11a, 22-24). At that time, he realized that he had been involved in a gambling raid in Long Branch, New Jersey in 1962 or 1963 in which the defendant was arrested (R8a, 18-22). On cross-examination, Mazekian admitted that he did not know whether the defendant had been convicted of the offense for which he had been arrested, or, in fact, whether he had been charged with a crime (R10a, 10-17).

Special Agent Duffy testified that he was executing the arrest warrant for Delloiacono and the search warrant for the premises (R14a, 34-15a, 5). Issuance of the warrants resulted from information supplied by a government investigator, James A. Taylor, that he had placed numerous bets with Delloiacono (R15a, 2-15; 16a, 15-21). Duffy added that Taylor had also reported that he (Taylor) had "observed a man fitting the description of Sam Wrieole accept a wager two days prior to the raid." (R16a, 21-23). Duffy did not see the defendant being searched (R16a, 39-17a, 2), but first observed him after the contents of his pockets were present on the store counters (R17a, 2-6; 19a, 12-16). The defendant was one of the five or six persons on the premises at the time of the execution of the Delloiacono warrants (R18a, 27-32).

Special Agent Dubow also testified at the hearing on the motion to suppress. He stated that there was a file on the defendant in the Intelligence Division, but did not disclose the contents thereof (R23a, 6-7). Defendant had an arrest record, and had been seen on a daily basis at Mike's Sugar Bowl between the hours of 11:00 A. M. and 1:00 P. M. (R23a, 8-10, 29-36). These hours were stated to be "the critical wagering period." (R23a, 32.) He conceded that they also constituted lunch time (R25a, 29-30). He further testified that he had received information from an undercover agent that a person fitting the description of the defendant had accepted a bet two days before the raid (R23a, 37-39).

The motion to suppress evidence was denied in an oral opinion from the bench (R31a, 9-34a, 41), as was a motion to dismiss the Information based on the unconstitutionality of the Federal gambling tax statutes (R35a, 1-20; R1a, 18-20).

Trial of the within matter was commenced on May 19, 1966. The Government's first witness, one Sadie Rosen, testified that she was employed by the Internal Revenue Service as a returns coordinator in Newark and that a check of the records of her department revealed no special occupational tax return or registration information filed by the defendant (R39a, 20-40a, 20). This was conceded by the attorney for the defendant on opening to the jury.

Cross-examination as to the qualifications of James A. Taylor, Jr. and Irving Dubow, agents of Internal Revenue called by the Government, produced the following description of a typical gambling operation. It is headed by a "banker", the person in charge who bears the financial burden and risk of loss (R44a, 27-30, 37; R60a, 30-34; R68a, 14-18, 27-30). Contact with the bettor is made by the "writer", also called "bookmaker", who initially records the wager (R42a, 3-5; R68a, 4-5, 38-39). The wager is transferred to the control of the banker by a "runner"

who physically picks up the bets of the bookmaker (R42a, 30-35), or through a "sitter", who receives relays over the telephone (R68a, 6-7). The operation employs various clerks (R45a, 30; R69a, 3-4), errand boys and hangers-on (R16a, 2-4, R69a, 16—R70a, 13), and someone known as a "controller" who is responsible for the collection and distribution of funds in a particular geographic area (R45a, 27-35; R69a, 7-15). The agents indicated that a numbers operation is almost invariably set up along the foregoing lines (R44a, 24—R45a, 20), but that in a horse-race operation conducted on a small scale, these functions can be consolidated (R42a, 18-22; R68a, 15-16). The agents did not indicate how to determine whether a writer or bookmaker was independent or part of the larger operation. Their testimony further indicated that a wagering operation involved a substantial amount of paper work and bookkeeping (R42a, 36—R43a, 3; R55a, 19-42; R60a, 12-21; R62a, 8-25).

Returning to the specific facts of the instant matter, Taylor testified that in the course of his duties as investigator assigned to the Intelligence Division, he was present on the premises known as Mike's Sugar Bowl on six occasions during the month of December 1964 (R40a, 34-37; R46a, 23-35). On several of these occasions he observed the defendant in the store (R47a, 6-12). On December 3rd, he saw the defendant talking with two men and heard names he recognized as the names of horses (R49a, 18-21). On December 4th, he observed the defendant come out of a telephone booth making notations on a 3 x 5 pad (R50a, 24-30). On December 7th or 9th, he observed the defendant repeat the name of a horse on the telephone and emerge from the booth making a notation (R50a, 32—R51a, 3).

Taylor stated that he saw the defendant on one other occasion. On December 15th, he observed a man emerge from a telephone booth, give the defendant a slip of paper and say "Four dollars on Powan." (R51a, 21-37.) The defendant was said to have placed the slip in his pocket (R51a, 39-40).

Taylor was asked to identify a slip of paper, later admitted into evidence as G-1 (R98a, 29-32) and identified as having been seized from the person of the defendant (R71a, 30-35). He stated (R57a, 4-5):

> "This is the type slip a banker *or* a bookmaker *or* a bet controller usually has in his possession . . .". (Emphasis added.)

On cross-examination, Taylor conceded that only the incident of December 15 was mentioned in a report drawn by him covering each day's activities during December (R59a, 7-11). The report was drawn up at the end of each day of investigation (R58a, 36-37), but did not include a notation of any of the activities allegedly observed by Taylor on December 3rd, 4th, 7th or 9th (R59a, 7-25). He stated further that he had no direct knowledge of the source of Exhibit G-1 (R60a, 10-12).

Special Agent Dubow again testified concerning his participation in the raid of December 16th. At the trial, as opposed to the hearing on the motion to suppress (R26a, 36-38), Dubow was able to recall that all of the persons on the premises were searched (R71a, 5-10). He restated his observation of the search of the defendant (although he did not make it) (R71a, 22-23), and testified that the defendant possessed an amount of currency in excess of $700 and the slip of paper identified as G-1 (R71a, 25-35). He explained that G-1

> " is what I would call a ribbon or a settlement sheet. The ribbon is referred to in the parlance of the gambling circles as a settlement sheet between a principal *or* someone who has to account for the moneys and the bettors or other writers." (R72a, 4-9.) (Emphasis added.)

After explaining some of the notations on the sheet, Dubow expressed his opinion that such an item would customarily

be carried by a "bookmaker." (R73a, 4-8). He had previously defined that term as a writer who has contact with a bettor (R68a, 4-5, 38-39).

On cross-examination, Dubow agreed that he had given no figure on G-1 which corresponds to the sum of money carried by the defendant (R75a, 13-22). He gave the defendant a receipt for the money seized from him (R80a, 24-25), but did not give the defendant a receipt for G-1 (R80a, 18-19). He agreed that "it would be generally accepted standard" to give a receipt for property of any kind, whether money, papers, or keys, taken from a person during a search (R80a, 39-R81a, 6).

At the end of the Government's case, the defendant moved for judgment of acquittal on the ground that the government had failed to produce sufficient evidence from which the jury might rationally conclude beyond a reasonable doubt that the defendant was engaged in the business of accepting wagers on his own behalf. The motion was denied (R94a, 20-R98a, 17).

The first witness for the defendant was one Anthony Wrieole, who identified himself as a nephew of the defendant (R99a, 16-17). He testified that the defendant was unable to read or write (R99a, 20-21), and that he (Anthony), throughout his life, had had to read his report cards, magazine articles and mail to the defendant (R100a, 2-8; R101a, 34-39).

The final witness for the defendant was Dr. James B. Spradley, a psychiatrist licensed to practice medicine in 1919 (R108a, 2-4). His qualifications appear on Page 108a of the Record.

Dr. Spradley examined the defendant on May 18, 1966 (R108a, 40-R109a, 4), and as a result thereof, reached the following conclusion (R109a, 13-17):

> "He is a mentally-retarded individual, and his retardation is to the level that we call a moron, as his

intelligence quotient, based upon 100 percent, is between 65 and 70. He is unable to read. He is unable to write."

After setting forth the basis of his opinion (R109a, 20-R110a, 26), the doctor opined that the defendant is incapable of writing down the name of a horse or a bettor (R111a, 20-30).

On the basis of the foregoing, the jury returned the verdict of guilty on Counts II and III of the Information. Defendant was sentenced on July 5, 1966, he was placed on probation, without supervision, for a period of five (5) years, received a term sentence which was suspended, and was ordered to pay a fine in the amount of $3,500.00 all of which had reference to the Second Count of the Information (R139a, 36-41). Sentence on the Third Count was suspended (R140a, 2-3). Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on July 8, 1966 (R141a; R2a, 35), and an order staying judgment pending disposition thereof was entered on July 11, 1966 (R142a). Judgment was affirmed by the Court of Appeals on June 16, 1967 (11a). This Petition followed.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to permit this defendant to join in the presently existing attack on the Federal Wagering Tax Statutes.

In *Costello* v. *United States,* 383 U.S. 942, 16 L. Ed. 2d 205 (1966), *Marchetti* v. *United States,* U.S. , 17 L. Ed. 2d 540 (1966), and *Grosso* v. *United States,* 385 U.S. 810, 17 L. Ed. 2d 53 (1966), this Court has granted petitions for writs of certiorari to consider the very question set forth as the first Question Presented in this Petition.

In view of the cases cited above, and in furtherance of the purposes of Rule 23, 4 of the Revised Rules of the Supreme Court of the United States, the Petitioner will assume that this Court is convinced of the importance of the question here presented and that there is some merit to the Petitioner's position on that question.

Petitioner respectfully submits that the outcome of the instant matter should be delayed to permit him to join in the pending attack on the validity of the federal gambling tax scheme. One need only postulate the denial of certiorari here today and a decision striking down the federal gambling tax statutes tomorrow to bring into sharp focus, the relief here sought. While a similar (albeit, not as striking) situation is unfortunately the result in many instances after decision by this Court, such a result *is* unfortunate and should be avoided if the Court can do so without substantial detriment to the entire system of jurisprudence.

The grant of the writ herein would not constitute a retroactive application of nor anticipate the decision of the court in the cases cited above. It would simply and equitably bestow upon Sam Wrieole the same opportunity to present the same meritorious position as the defendant's therein. Considerations of fundamental justice permit of no less.

II. The government failed to prove the defendant to be a principal in a gambling operation and this Court should assume jurisdiction to clarify the burden of the government under the Federal Gambling Tax Statutes.

Assuming that the statutes here attacked are ultimately to be upheld, then the issue of sufficiency of evidence implicated in this controversy acquires substantial importance. It is an issue which has not been, but should be ruled upon by this Court in concrete terms.

The Information filed by the Government and under which it proceeded in the trial of this matter contained three counts, each of which was grounded upon the substantive allegation that the defendant was "engaged in the business of accepting wagers". (R3a, 9-10, 27-28; R4a, 6-7). The quoted passage, of course, is found in the statutes which the Government alleged placed the tax and registration burdens upon defendant. 26 U. S. C. Sec. 4401 (c) ("Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him."); 26 U. S. C. Sec. 4411 ("There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under Section 4401 . . ."); 26 U. S. C. Sec. 4412 (a) ("Each person required to pay a special tax under this subchapter shall register . . .") It is defendant's position on this appeal that because of the use of the quoted clause in the information, it was the burden of the Government to prove beyond a reasonable doubt that the defendant was a "banker" in a gambling operation and that proof by the Government that the defendant was a "writer" or proof which did not provide the jury with a reasonable basis to conclude whether the defendant was a banker or writer was insufficient to satisfy its burden.

In short, it is defendant's position that a banker, and only a banker, is "a person engaged in the business of accepting wagers." While there can be no question but that

a "writer" in a gambling operation physically receives wagers, it is submitted that that occupation is not covered by the language of the statutes quoted above, but by that portion of the applicable statutes which impose liability upon a person "who receives wagers for or on behalf of another person. . . ." 26 U. S. C. Sec. 4401 (c); see, also, 26 U. S. C. Sec. 4411 (". . . or who is engaged in receiving wagers for or on behalf of any person" who is engaged in the business of accepting wagers.); see, also, 26 U. S. C. 4412 (a) (3).

The distinction between banker and writer has been firmly settled by this Court in *United States* v. *Calamaro,* 354 U. S. 351, 356, 360, 1 L. Ed. 2d 1394 (1957), and by lower federal courts. *United States* v. *Nicholas,* 224 F. Supp. 310 (W. D. Pa. 1963); *United States* v. *Pepe,* 198 F. Supp. 226, 227-228 (D. Del. 1961), affirmed, 339 F. 2d 264 (3rd Cir. 1964); *United States* v. *Manos,* 340 F. 2d 534, 538 (3rd Cir. 1965); *Evans* v. *United States,* 349 F. 2d 653, 656-657 (5 Cir. 1965); *George* v. *United States,* 346 F. 2d 137, 138-139 (9th Cir. 1965).

It has been the Government's practice to file six-count informations in cases such as that presently before the Court. Three of the counts charge that the defendant "engaged in the business of accepting wagers" (banker) and three charge that the defendant "received wagers for or on behalf of a person engaged in the business of accepting wagers." (writer) For reasons unknown to this defendant, the Government chose to prove him to be a banker by filing an information containing only three counts. That choice having been made, and with the foregoing authorities as foundation, the question under this heading becomes whether or not the Government proved or offered to the jury a rational basis for finding beyond a reasonable doubt that the defendant was a banker, a person who is "engaged in the business of accepting wagers' as a 'principal . . . on his own account.' " *United States* v. *Calamaro, supra* (354 U. S., at p. 360).

The testimony of the Government's experts in the instant matter agrees with the above classification of functions in a gambling operation, whether bookmaking or numbers, and is summarized at page 5 of the Statement of the Case herein.

Taking the Government's evidence at its best, it was shown that the defendant was present at Mike's Sugar Bowl on several occasions in December 1964, that he discussed horses in the luncheonette and over the telephone and sometimes made notations. On one occasion, he accepted a slip of paper from someone who said "Four dollars on Powan," and, at the time of the raid, was possesed of some $700 and G-1.

It is immediately apparent that proof of discussion of horses and, in fact, acceptance of a bet does not discharge the Government's burden. Such proof provides a point of departure, but must be coupled with evidence upon which the jury can conclude or from which the jury can rationally infer that the defendant was acting as a principal, i.e., on his own account. *United States* v. *Calamaro, supra.*

It is further apparent that this latter aspect of the Government's case was founded upon G-1, the adding machine tape seized from the defendant. The testimony from the Government's own witnesses, however, fell far short of supplying the jury a rational basis for concluding that the presence of that tape on the defendant was proof that he was a banker. Taylor, the undercover agent testified (R57a, 4-5):

> "This is the type of slip a banker *or* a bookmaker *or* a bet controller usually has in his possession. . . ." (Emphasis added.)

It is important to note that Taylor had previously defined "bookmaker" as a writer of bets (R42a, 3-5), who may, or may not be, working on his own account (R42a, 18-22). He offered no basis for determining whether a writer is or is not operating on his own account. A "bet controller" had

been previously explained by Taylor to be an employee responsible for the collection and distribution of funds in a particular geographical area (R45a, 27-35). Thus, Taylor's testimony simply established that the existence of G-1 on defendant indicated that the defendant was either a banker (liable for tax under the Information filed in this case), writer (liable for tax, but not under the Information filed in this case), or controller (not liable for tax).

Dubow was similarly unhelpful. He explained that G-1

> "... is what I would call a ribbon or a settlement sheet. The ribbon is referred to in the parlance of the gambling circle as a settlement sheet between a principal *or* someone who has to account for the monies and the betters *or* other writers." (R72a, 4-9) (Emphasis added.)

He stated that such an item would customarily be carried by a "bookmaker" (R37a, 4-8), a term he had previously defined as a writer who has contact with a better (R68a, 4-5, 38-39).

Thus, accepting every element of the Government's proof at face value, a trier of fact can only *wonder* which inference to make. Did G-1 show that defendant was a banker or principal? Or, did it show him to be a bet controller who had to account for monies from the principal to writers? Or did it show him to be a writer accounting for monies from his principal to betters?

While the inference that defendant was a banker is permissible *in vacuo*, a criminal case cannot be decided in that context. The jury must be offered some reason, i.e., evidence, to draw that inference as opposed to any other equally rational. As noted in *United States* v. *Nicholas*, *supra* (224 F. Supp., at p. 311):

> "The situation is the same as if a defendant were charged with adultery and fornication, and the proof merely showed sexual intercourse without indicating whether the parties were married."

One searches the record in vain to determine whether the defendant's acts constituted adultery or fornication, that is, banking or writing. That being so, it is respectfully submitted that the Government failed to prove the guilt of the defendant as charged beyond a reasonable doubt and the trial court's denial of defendant's motion for judgment of acquittal was error.

If the constitutionality of the federal gambling tax scheme is ultimately upheld by this Court, the question of the nature and quantum of proof required to sustain convictions becomes of great significance. It is suggested that this case presents an excellent vehicle for this Court to decide these issues for the first time.

III. The decision below upheld an unreasonable search on the basis of principles of law governing arrest extant in New Jersey, which principles are contrary to the fundamental criteria of the Fourth Amendment.

This case involves the validity of the search of a defendant prior to his arrest. It involves the search of five to eight persons present on premises to which the public was invited (R71a, 5-10) and the subsequent arrest of the only two upon whom items of an evidentiary nature were found. It involves a decision by the United States Court of Appeals for the Third Circuit that words of search ("Empty your pockets") constitute words of arrest, without mention of the necessary concomitant of special factual elements which would justify that transposition. It involves a consideration by this Court of the situation extant in New Jersey whereby an officer placing his hand on someone's shoulder and saying "you are under arrest" is held not to have effected an arrest at that time (*State* v. *Romeo*, 43 N.J. 188, 203-206, 203 A. 2d 23 (1964)), while an officer who approaches a man and utters no words of arrest but merely searches is held to have effected an arrest (*State* v. *Contursi*, 44 N.J. 422, 209 A. 2d 829 (1965)). One must assume the risk of understatement to suggest that there is an urgent

need for this Court to wade into this morass which clogs the proper development of the mainstream of search and seizure law in this country.

Defendant was taken into custody on December 16, 1964. At that time, Special Agents Michael Duffy and Irving Dubow were executing a warrant for the arrest of one Michal Delloiacono (R14a, 34-41) and a search warrant for premises owned by him and known as Mike's Sugar Bowl (R15a, 3-6; R20a, 36-41). They, and other law enforcement officials (R21a, 6-14), were assisted in that endeavor by Detective John Mazekian of the New Jersey State Police (R7a, 4-21). They found some five to eight individuals on the premises, the defendant among them (R10a, 39-41; 7a, 33-34; 18a, 26-32; 19a, 5-8; 21a, 24-25; 26a, 30-31). He was directed by Mazekian to empty his pockets (R12a, 3-8) and placed the contents thereof on a counter in the store (R12a, 29-30; R17a, 2-5). The agents allegedly seized a "rundown sheet" and currency in excess of seven hundred dollars from defendant (R17a, 5-7; 71a, 25-29). They also searched the defendant's car (R27a, 27-28), the person of one Russell Miraglia (R12a, 29-30), Miraglia's car (F27a, 19-20), the car of one of the other men found on the premises (R27a, 4-11), and the persons of the men in the store at the time of the raid (R71a, 5-10; 26a, 35-40). These actions were all taken without benefit of a search warrant (R6a, 28-30; R27a, 25-26; R27a, 29-30). Only Delloiacono, Miraglia and the defendant were arrested. (R26a, 31-32). The agents found approximately $1,400 and a schedule of basketball games on the person of Miraglia (R12a, 22-25).

Trooper Mazekian testified that he entered Mike's Sugar Bowl at 11:00 A.M., made a brief search, advised the occupants of his purpose, and directed the defendant and another to empty their pockets (R7a, 24-31; R8a, 2-5; R12a, 2-7). Prior to the raid, he had been told by federal agents that a gambling operation was being conducted at Mike's Sugar Bowl and that bets had been made there (R8a, 24-31; 12a, 40-13a, 5). He did not know the name of the person who

had given him that information (R13a, 4-5). His "purpose there was to effect any State arrest as the situation may warrant after the raid was in progress." (R8a, 37-39).

There was no testimony by Mazekian that he had expected to find the defendant on the premises. He ascertained the defendant's identity during the raid (R8a, 4-5; 11a, 22-24). At that time, he realized that he had been involved in a gambling raid in Long Branch, New Jersey in 1962 or 1963 in which the defendant was arrested (R8a, 18-22). On cross-examination, Mazekian admitted that he did not know whether the defendant had been convicted of the offense for which he had been arrested, or, in fact, whether he had been charged with a crime (R10a, 10-17).

Anyone looking for an arrest in the foregoing facts is faced with the immediate burden that one did not, at least by name, take place. Certainly, the trial court made no express finding on this issue and seems to have assumed that an arrest of the defendant occurred at some indeterminate time which was left undetermined (R34a, 30-37). The Government, meanwhile, had similar difficulties in this regard and it was not until the filing of an answering brief in the United States Court of Appeals for the Third Circuit that the Government seized upon the theory that Mazekian arrested the defendant when he told him to empty his pockets. It was upon this reed that the decision of the Court of Appeals was based.

The decision by the Court of Appeals that an arrest had taken place was based, as this Court has directed, upon the laws of arrest of the State of New Jersey. *United States* v. *DiRe,* 332 U.S. 581, 589, 92 L. Ed. 210, 217 (1948). The Court below relied upon *State* v. *Contursi, supra,* which, viewed in conjunction with *State* v. *Romeo, supra,* precisely demonstrates the need for some control by this Court of the principles governing the law of arrest.

In *State* v. *Contursi, supra,* municipal policemen entered a restaurant and observed the defendant in a telephone

booth. They recognized him as a person recently arrested as a participant in a dice game and as the subject of information received from reliable informers connecting him with illegal horse race gambling activities. The officers observed the defendant speaking on the telephone and holding a piece of paper in one hand. When the defendant observed the officers, he "stopped talking, hung up the receiver and slipped the hand which had been holding the paper under his left thigh between his leg and the booth seat." (44 N.J., at p. 427). As the defendant left the booth, one officer told him to empty his pockets, viewed the contents, took the defendant to police headquarters and charged him with bookmaking.

Defendant argued that he was not arrested before the search and that his subsequent arrest was improperly based upon the fruits of that search. The Supreme Court of New Jersey held: ". . . the arrest, in the connotation involved, legally took place by the command to disgorge the contents of the pockets and thus prior to the search, at which moment, as we have previously held, there was probable cause to arrest. . . . The restraint of the person and restriction of liberty of movement was sufficient . . . to constitute the arrest." (44 N.J., at p. 43).

In *State* v. *Romeo, supra,* a federal agent, executing a premises warrant for a store to which the public was invited, approached the defendant, asked him his name and then "'immediately . . . placed him under arrest and advised him of his constitutional rights.'" (43 N.J., at pp. 203-204). The Supreme Court assumed at that moment that there was no right to arrest the defendant without a warrant. Immediately following the foregoing, the defendant was observed reaching into a pocket, extracting a packet of papers, and throwing them toward the wall. Another agent recovered the packet, noted that they had to do with gambling, and directed the defendant to empty his pockets. Defendant was subsequently charged with bookmaking.

The defendant argued "that the original action of the agent constituted an arrest which was illegal . . . and that all the evidence which was the fruit of it . . . was unlawfully obtained and so inadmissible." (43 N.J., at p. 205). The Supreme Court of New Jersey held: ". . . despite the formal language of arrest used by the agent, his action should not be legally characterized as such in the usual sense, but rather considered simply as a justifiable temporary detention of this defendant during a raid. . . . So the packet tossed away by him almost immediately thereafter was not the fruit of an illegal arrest. . . ." (43 N.J., at p. 206). The second arrest, based upon the packet which had been tossed away, was upheld.

Thus, the same court which decided that the placing of a person under arrest and advising him of his constitutional rights is not "an arrest" for purpose of search and seizure law, also decided one year later that telling a person to empty his pockets involves sufficient "restraint of the person and restriction of liberty of movement . . . to constitute the arrest." *State* v. *Contursi, supra* (44 N.J., at p. 433). The only element which binds these two decisions is result; in the former the existence and in the latter the nonexistence of an arrest at a given point in time was essential to a result of a lawful search and seizure. Principle, of course, must be tempered by result, for only in that way can principle grow to meet the multi-faceted and ever changing demands of human relationships. To temper, however, is not to control. In a society based upon and devoted to perpetuation of the Rule of Law, principle has a value far beyond its immediate effect upon result.

The importance of sound principle in the area of the law of arrest cannot be underestimated. The validity and timing of an arrest will, of course, often control the validity of an "incidental" search. The role of principle is greatly magnified when it is considered that it is most often forged at the impetus of an obviously guilty defendant whose very role in the process creates substantial visceral barriers to

the impartial application of doctrine. And, the factor of arrest has significance beyond search questions. One need only postulate Mazekian not only telling defendant to empty his pockets, but, also, asking him what he was doing in the luncheonette, and receiving a damaging admission in response to that question. If the search had been fruitless, it would require no great effort of imagination to consider the Government and defendant exchanging positions and the former arguing that the command to empty pockets was an investigatory and not custodial detention.

This Court has firmly held that the Fourth Amendment requires adherence to judicial processes as a prerequisite to lawful search and seizure. *United States* v. *Jeffers,* 342 U.S. 48, 51, 96 L. Ed. 59 (1951); *Preston* v. *United States,* 376 U.S. 364, 367, 11 L. Ed. 2d 777 (1964). Search incident to arrest is an exception to this rule, an exception which has "been jealously and carefully drawn." *Jones* v. *United States,* 357 U.S. 493, 499, 2 L. Ed. 2d 1514 (1958). It is as much a subversion of the Constitution to call a search an arrest as it is to call an arrest warrant a search warrant. The courts of New Jersey and the Third Circuit, in turn, have actually equated search and arrest, for if the command "Empty your pockets" constitutes an arrest, it is difficult to conceive of a search of a person or search of premises with someone present that does not constitute an arrest. Every search in the presence of someone necessarily involves some limitation upon the freedom of that person.

While the States are free to "develop[e] workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement,'" those rules must comport with the "'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment." *Ker* v. *California,* 374 U.S. 23, 33, 10 L. Ed. 2d 726, 738 (1963).

The equation of search and arrest by the court below following the Supreme Court of New Jersey has validated

a search, the dominant motive of which was to secure evidence upon which to arrest the defendant. Mazekian's purpose was solely investigatory; he was there "to effect any State arrest *as the situation may warrant* after the raid was in progress." (R8a, 37-39) (Emphasis added). In fact, he did not permit "the situation" to "warrant" any action, for immediately upon entry he ordered the defendant to empty his pockets (R11a, 24-40). That Mazekian's purpose was investigatory and that he did not arrest the defendant is clear from his own testimony at the hearing on the motion to suppress (R11a, 30-40):

> "Q. Where were the defendants then? (11) A. Standing in the central part of the room.
>
> Q. You went up to them? A. Yes.
>
> Q. What did you say? A. Asked who they were. They told me. I advised one to go one way, one to stay where he was *so they could be searched further for identification and anything else* they may have had on their possession.
>
> Q. Then what? A. They complied with the request.
>
> Q. *That was it as far as you were concerned?* A. *Yes.*" (Emphasis added).

Mazekian's failure to arrest and his investigatory purpose bring his action in direct conflict with the fundamental criterion laid down in *Jones* v. *United States,* 357 U.S. 493, 2 L. Ed. 2d 1514 (1958). There, the Court found determinative the subjective premises upon which law enforcement officials acted and struck down a search made independent of arrest and for the sole purpose of discovering evidence (357 U.S., at p. 500). The lower federal courts have consistently applied this principle. See, *Lee* v. *United States,* 232 F. 2d 354, 355-356 (D.C.Cir. 1956); *DePater* v. *United States,* 34 F. 2d 275, 276-277 (4th Cir. 1929); *McKnight v. United States,* 183 F. 2d 977-978 (D.C. Cir. 1950); *Worthington* v. *United States,* 166 F. 2d 557, 566-567

(6th Cir. 1948); *Henderson* v. *United States*, 12 F. 2d 528 (4th Cir. 1926); *United States* v. *Kowal*, 197 F. Supp. 401, 404 (D. R.I. 1961); *United States* v. *Lassoff*, 147 F. Supp. 944, 953 (D. Ky. 1957); *United States* v. *Pollack*, 64 F. Supp. 554, 558 (D. N.J. 1946); *United States* v. *Sully*, 56 F. Supp. 942 (S.D. N.Y. 1944).

This principle is firmly grounded in reason. The policy of deterring police officers from engaging in unreasonable conduct is certainly not served by allowing them to engage in conduct which in their own minds is unreasonable or would be unreasonable if considered and by the condoning of such conduct on the basis of theory subsequently propounded by the United States Attorney. Assume the officer's "act of judgment" (*Brinegar* v. *United States*, 338 U. S. 160 176 (1949)) in this case to have been (as it undoubtedly was) the following: "I have no basis to arrest the suspect, but I will search him to see what I can discover." The Fourth Amendment must be applied to protect the public from this kind of thinking. Mazekian operated under the theory that he could enter a luncheonette which was being searched by federal officers and search each and every person on the premises "for identification and anything else they may have on their possession." (R11a, 35-37.) Cf., *United States* v. *DiRe*, 332 U. S. 581 (1948). The conflict of that kind of thinking with the Fourth Amendment is fundamental and should not be condoned to guide the actions of law enforcement officials in the future.

CONCLUSION

For the foregoing reasons and based on the foregoing authorities, Petitioner respectfully requests this Court to grant the Petition for Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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